CHOONG NAM FATHER & SONS CONSTRUCTION SDN BHD v. CHARERN PROPERTIES SDN BHD

HIGH COURT MALAYA, IPOH
MOSES SUSAYAN JC
[CIVIL SUIT NO: AA-22NCvC-22-03-2021]
14 DECEMBER 2023
[2024] CLJ JT(1)

Abstract – *By interpreting the Rules of Court 2012 ('ROC') in their true spirit, which is to ensure justice and fairness, an application to extend a writ's validity, especially when it is a sincere pursuit of justice supported by continuous proactive actions, emerges as not only legitimate but also a necessary step in ensuring that the principles of justice are upheld. Interpreting O. 6 r. 7(2) of the ROC as imposing an absolute limit on the number of renewals diverges from the rule's intended purpose. Such a rigid interpretation could inadvertently impair the administration of justice rather than facilitate it. It risks penalising diligent litigants who, despite their efforts, are unable to serve the writ due to factors beyond their control.*

CIVIL PROCEDURE: *Writ of summons – Extension of – Application for – Application for extension after writ's validity period – Judgment in default and order for substituted service obtained set aside after writ's validity period – Whether legal action promptly initiated and proactive approach was taken by seeking to extend writ's validity – Whether court in position to exercise discretionary power to extend writ under O. 6 r. 7(2) of Rules of Court 2012 ('ROC') – Whether court should prioritise overriding interest of justice over technical non-compliance – Whether court ought to exercise inherent jurisdiction under O. 92 r. 4 of ROC – Whether court should retain inherent power to extend writ beyond limit expressly set out by O. 6 r. 7(2) to prevent injustice – Rules of Court 2012, O. 1A, O. 3 r. 5*

This was the plaintiff's application for an extension for the validity of a writ issued on 16 March 2021. On the said date, both the writ and statement of claim were formally filed. Subsequently, attempts were made to serve this writ on the defendant at their business address. Unfortunately, both methods of delivery, the AR registered post and personal service, were unsuccessful. As an alternative, the plaintiff sought and obtained an order from the court on 1 June 2021 to serve by substituted service. By 16 August 2021, the plaintiff had secured a judgment in default. However, a turn of events saw the defendant successfully having this judgment in default, along with the order for substituted service, set aside on 4 January 2023. Given these circumstances, the plaintiff was now constrained to extend the validity of the writ of summons to ensure its proper service on the defendant. According to

A the defendant's calculations, there was a delay of one year and four months after the expiry of the writ. The writ was issued on 16 March 2021 and its validity ended on 16 September 2021. However, the plaintiff filed an application for an extension on 20 January 2023, which was not submitted before the expiry of the writ. This delay constituted a breach of O. 6 r. 7(2A)
B of the Rules of Court 2012 ('ROC'), forming the basis of the defendant's contention. The plaintiff submitted that even though the writ on 16 March 2021 was due to expire on 15 September 2021 (six months), they effectively stopped the timeline by obtaining the judgment in default on 16 August 2021. This left remaining a month more before expiration. However, when the
C court set aside the judgment and the order for substituted service on 4 January 2023, it brought forward the remaining one-month period. This, according to the plaintiff, gave them until 3 February 2023 from 4 January 2023 to request for an extension. Hence, the filing of the application on 20 January 2023. The plaintiff submitted that they met the time period of six months provided for under O. 6 r. 7(2A) of the ROC. To support their
D contention, the plaintiff referred to the case of *Ever Rich Enterprise v. Ten Mei Theng*, which suggested that the timeline should not run straight from the writ's original date, especially if there was an acquired judgment in default that was later set aside.

E **Held (allowing plaintiff's application):**

(1) The plaintiff promptly initiated the legal action and subsequently attempted to serve the writ on the defendant. The timeline and attempts made showed the plaintiff's genuine intentions to serve the defendant and this suggested no deliberate delay. The plaintiff, after facing failed
F attempts of service through AR registered post and personal means, did not resort to inaction but proactively sought the court's leave to serve by substituted service. The order for substituted service showed the court's initial acceptance of the plaintiff's reasons for substituted service. The plaintiff secured a judgment in default due to the defendant's
G non-response, further showing the plaintiff's proactive approach. When the court set aside the substituted service and the judgment in default, the plaintiff, rather than resorting to inaction, sought to correct the situation by extending the writ's validity. This move underscored the plaintiff's commitment to ensure that due process was complied with. (paras 20-23)

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(2) As per O. 1A of the ROC, the overriding interest of justice should be prioritised over technical non-compliance. The plaintiff's application embodied this spirit. While there might be technical procedural challenges, the primary pursuit of justice mandated that the plaintiff's
I proactive efforts not be negated by these minor misgivings. (para 24)

(3) Order 3 r. 5 of the ROC provides the court with the discretion to extend time periods, even post the expiration of the original period. This provision explicitly recognises the fact that practical scenarios might necessitate such extensions, and the plaintiff's situation was a case in point. (para 25)

(4) Writ extension principles, by O. 6 r. 7 of the ROC states the framework for writ extensions. The plaintiff's application respected this framework and met the conditions stipulated therein. Moreover, the plaintiff's application came within the time frame, a fact underscored by the case of *Ever Rich Enterprise v. Ten Mei Theng* which accentuated the principle of viewing writ validity in intervals. (para 26)

(5) Order 92 r. 4 of the ROC acknowledges the court's inherent powers to ensure justice is served and prevents the abuse of legal processes. The plaintiff's situation was an opportunity for the court to exercise this power, ensuring that justice was not overshadowed by rigid procedural technicalities. (para 27)

(6) The plaintiff's application represented a sincere pursuit of justice, supported by their continuous proactive actions. The plaintiff could not be faulted in any way for the 'delay' between the period when judgment in default was entered and the time it was set aside. By interpreting the ROC in their true spirit, which is to ensure justice and fairness, the plaintiff's request to extend the writ's validity emerged as not only legitimate but also a necessary step in ensuring that the principles of justice are upheld. Both parties should therefore be given an opportunity to ventilate the merits of each of their respective cases. (para 33)

Obiter:

(1) The rationale behind O. 6 r. 7(2) of the ROC applies to all cases where it serves a specific purpose in ensuring due diligence among litigants, particularly focusing on the service of a writ. It is a measure against indolence in litigation, ensuring that parties actively pursue their legal rights and obligations. Interpreting O. 6 r. 7(2) of the ROC as imposing an absolute limit on the number of renewals diverges from the rule's intended purpose. Such a rigid interpretation could inadvertently impair the administration of justice rather than facilitate it. It risks penalising diligent litigants who, despite their efforts, are unable to serve the writ due to factors beyond their control. (paras 36 & 37)

(2) The court's inherent powers are not confined to situations where there is a gap or *lacuna* in the ROC. Even if O. 6 r. 7(2) of the ROC expressly limits the number of times a writ can be extended, the court should retain the inherent power to go beyond this limit to prevent injustice. This approach ensures that a litigant's statutory right to pursue their claim is not unjustly defeated by a strict and pedantic reading of O. 6 r. 7(2) of the ROC. (para 38)

Case(s) referred to:

Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 CA ***(refd)***

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***

Ever Rich Enterprise v. Ten Mei Theng [2018] CLJU 1402 HC ***(refd)***

FIMBank Plc v. The Owners And/Or Demise Charterers Of The Ship Or Vessel "NIKA" Now Known As "Bao Lai" [2022] 8 CLJ 324 HC ***(refd)***

Fimbank Plc v. Pemilik Dan/Atau Pencarter Demis Kapal Atau Vesel "NIKA" Kini Dikenali Sebagai "Bao Lai" [2023] 10 CLJ 165 ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 1A, O. 3 r. 5, O. 6 r. 7(2A), O. 92 r. 4

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JUDGMENT

Moses Susayan JC:

Introduction

[1] This is the plaintiff's application for an extension for the validity of a writ issued on 16 March 2021.

[2] On 16 March 2021, both the writ and statement of claim were formally filed. Subsequently, attempts were made to serve this writ on the defendant at their business address in Ipoh. Unfortunately, both methods of delivery, the AR registered post and personal service, were unsuccessful. As an alternative, the plaintiff sought and obtained an order from the court on 1 June 2021 to serve by substituted service. By 16 August 2021, the plaintiff had secured a judgment in default. However, a turn of events saw the defendant successfully having this judgment in default, along with the order for substituted service, set aside on 4 January 2023. Given these circumstances, the plaintiff is now constrained to extend the validity of the writ of summons to ensure its proper service on the defendant.

[3] According to the defendant's calculations, there was a delay of one year and four months after the expiry of the writ. The writ was issued on 16 March 2021, and its validity ended on 16 September 2021. However, the plaintiff filed an application for an extension on 20 January 2023, which was not submitted before the expiry of the writ. This delay constitutes a breach of O. 6 r. 7(2A) of the Rules of Court (ROC) 2012, forming the basis of the defendant's contention.

Plaintiff's Submission

[4] The plaintiff applies at the heart of this case to extend the writ from 16 March 2021. To succeed, the plaintiff needs to ensure that the application is in line with O. 6 r. 7(2A) of the ROC 2012. The plaintiff submits that even though the issued writ on 16 March 2021 was due to expire on 15 September 2021 (six months), they effectively stopped the timeline by obtaining the judgment in default on 16 August 2021. This left remaining a month more before expiration. However, when the court set aside the judgment and the order for substituted service on 4 January 2023, it brought forward the remaining one-month period. This, according to the plaintiff, gave them until 3 February 2023 from 4 January 2023 to request an extension. Hence, by the filing of the application on 20 January 2023, the plaintiff submits that they met the time period of six months provided for under O. 6 r. 7(2A) of the ROC 2012. To support their contention, the plaintiff refers to the case of *Ever Rich Enterprise v. Ten Mei Theng* [2018] CLJU 1402; [2019] 1 MLRH 194. This case suggests that the timeline should not run straight from the writ's original date, especially if there's an acquired judgment in default that is later set aside.

[5] This is what the court said in *Ever Rich Enterprise v. Ten Mei Theng* [2018] CLJU 1402; [2019] 1 MLRH 194:

> [8] Berdasarkan kepada fakta tindakan kes ini, Writ Saman adalah bertarikh 7 Januari 2013. Tempoh tamatnya enam bulan daripada 7 Januari 2013 adalah pada 6 Julai 2013. Satu Penghakiman Ingkar Kehadiran telah diperolehi pada 19 April 2013. Penghakiman Ingkar Kehadiran tersebut telah diketepikan oleh defendan pada 9 Januari 2018. Lantas permohonan pembaharuan Writ Saman di bawah Lampiran 28 ini difailkan pada 8 Jun 2018. Justeru itu masa tidak harus dikirakan secara berterusan daripada tarikh Writ Saman & Januari 2013 sehingga permohonan pembaharuan Writ Saman 9 Jun 2018. Dalam meneliti perkara ini, suatu Penghakiman Ingkar Kehadiran adalah merupakan suatu pengakhiran kepada tindakan ini, di mana tempoh Writ Saman akan berhenti pada tarikh Penghakiman Ingkar Kehadiran, 19 April 2013. Sekiranya Penghakiman Ingkar Kehadiran tersebut tidak diketepikan, maka Writ Saman akan masih mempunyai baki masa dalam tempoh tiga bulan lagi daripada tarikh Penghakiman Ingkar Kehadiran sehingga tarikh tamatnya tempoh asal keesahan Writ Saman (19 April 2013 hingga 6 Julai 2013). **Justeru itu Penghakiman Ingkar** Kehadiran tersebut telah menghidupkan semula Writ Saman daripada 9 Januari 2018, di mana tempoh keesahan Writ Saman tersebut bermula daripada tarikh 9 Januari 2018 dengan baki tempoh keesahan yang tertinggal. Dengan itu, Writ Saman akan tamat tempoh keesahannya pada atau ketika 8 April 2018. (emphasis added)

[6] The plaintiff firmly bases their application on several provisions of the Rules of Court 2012, which, when considered together, reinforce the court's commitment to upholding the principles of justice over procedural technicalities.

[7] To begin with, the plaintiff refers to O. 1A of the ROC 2012, which explicitly underlines the significance of appreciating the all-embracing interest of justice. In simpler terms, this order encourages courts to consider the broader scope of fairness and justice, rather than focusing on minor procedural or mere technical non-compliance. This principle suggests that the core focus should remain on ensuring the interest of justice, even if minor technicalities have to be overlooked in the process. It articulates that courts should not be swayed solely by procedural non-compliance. Instead, the primary consideration should always be the interest of justice. This provision underscores the judiciary's responsibility to ensure that justice prevails, even if it means overlooking minor technical breaches:

> **Regard shall be to justice (O. 1A)**
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> In administering these rules, the court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these rules.

[8] Next, they highlight O. 3 r. 5 of the ROC 2012. This provision is crucial as it grants the court significant discretion in matters of time frames. Specifically, the court possesses the inherent jurisdiction to either extend or abridge the time as defined in the Rules. Such flexibility is essential, especially in cases where strict adherence to stipulated time frames might lead to unjust outcomes or hinder the pursuit of justice.

> **Extension of time (O. 3 r. 5)**
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> 1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.
>
> 2) The court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
>
> 3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent in writing without an order of the court being made for that purpose.

[9] To further bolster their argument, the plaintiff refers to O. 6 r. 7 of the ROC 2012. This Rule goes into the specifics of how a writ's lifespan is determined and the circumstances under which its renewal can be sought. By mentioning this, the plaintiff aims to show their deep understanding of the

procedural intricacies related to their application and emphasise that their request for extension aligns with the prescribed procedure to extend a writ's validity. Two requirements must be met to allow extension and they are:

(i) the application for extension must be made before the original writ expires.

(ii) must furnish evidence showing earnest attempts to deliver the writ to the defendant within a month of its original issuance.

[10] Order 6 r. 7 of the ROC 2012, provides as follows:

Duration and renewal of writ (O. 6, r. 7)

(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for six months beginning from the date of its issue, and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(2) Subject to paragraph (2A), where efforts to serve a writ on a defendant have been unsuccessful, the court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions five times), not exceeding six months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

(2A) An application for a renewal of writ must be made before the expiry of the writ, *ex parte* by notice of application supported by affidavit showing that efforts have been made to serve the defendant within one month from the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

(3) Before a writ, the validity of which has been extended under this rule, is served, it shall be marked with an official stamp in Form 3 showing the period for which the validity of the writ has been so extended.

(4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served, so as to extend the validity of that other writ until the expiration of the period specified in the order.

(5) A note of the renewal shall be entered in the cause book.

[11] The plaintiff's reliance on the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 1 MLRA 528, focuses on the court's emphasis on the efforts and diligence required of the applicant to effect service. It is acknowledged that compliance with the conditions set forth in O. 6 r. 7 of the ROC 2012 is mandatory. The court stated as follows:

(1) Under the O. 6 r. 7(2A) of the RHC, there are *three requirements that must be adhered to before the court can grant a renewal of writ.* The first requirement is for the renewal to be made before the writ expired. The application also must be made *ex parte* through summons and supported by an affidavit which identifies two starting points which are: *the efforts have been made to serve the defendant in one month from the date of issuance of writ; and such efforts have been made subsequent thereto to effect service.* (paras 36 & 39)

(2) Renewal of writ by the court can only be made when O. 6 r. 7(2A) of the RHC has been satisfied. The applicant must use all due diligence to effect service as soon as possible. In order to grant extension, *the court must be satisfied that serious efforts have been made to serve through the details provided in the affidavits as to where, when and how attempts to serve are made.* (para 40)

(3) The requirements of O. 6 r. 7(2A) of the RHC are mandatory prerequisite. The applications by the respondents for extension of time for service of writs were defective as they did not show compliance with the RHC. (para 43)

(4) O. 1A RHC is a general provision that is not in the position to supersede a mandatory requirement of the Rules. O. 1A RHC cannot be invoked when a party purposely chooses to disobey the provision. *Thus in this case, O. 1A of the RHC did not apply as the respondents had purposely disregarded the O. 6 r. 7(2A) of the RHC for their own reasons. O. 1A of the RHC could not be invoked in order to cure the failure to comply with the pre-requisites of O. 6 r. 7(2A) of the RHC.*

(emphasis added)

[12] Lastly, the plaintiff invokes O. 92 r. 4 of the ROC 2012. This order serves as a testament that the court has broad and inherent jurisdiction. It is not just about ensuring the strict adherence of the court's procedural rules, but it also emphasises the court's moral and judicial duty to ensure fairness in its proceedings. The rule explicitly mandates the court to act decisively in the interest of justice or against any potential misuse of its processes, ensuring that the scales of justice remain balanced. Order 92 r. 4 of the ROC 2012 provides as follows:

Inherent powers of the Court (O. 92, r. 4)

For the removal of doubt it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[13] In summary, the plaintiff, by referencing to the principle postulated by the case of *Ever Rich Enterprise* (*supra*) and these other distinct provisions from the Rules of Court 2012, seeks to build a compelling case, emphasising both the letter and spirit of the law. They aim to highlight that their application for renewal of the writ aligns not just with the procedural mandates but also

resonates with the underlying principles of justice and fairness that the rules seek to uphold. The circumstances of the case are such that it is by no fault of the plaintiff that the application for extension had to be made by the plaintiff. As early as 19 March 2021 and 15 May 2021, the plaintiff has attempted to serve the writ on the defendant but was unable to serve. Due to these difficulties, they resorted to substituted service and obtained an order for substituted service on 1 June 2021. Following this, they successfully effected service on 16 August 2021 and obtained a judgment in default. However, both this judgment and the order for substituted service were set aside, rendering the writ, issued on 16 March 2021, expired due to its six-month validity period. When the judgment in default and the substituted service were set aside on 4 January 2023, the writ was no longer valid, through no fault of the plaintiff. In essence, the plaintiff is seeking to show that their application for renewal is justified, given the circumstances and their diligent attempts to adhere to both the letter and spirit of the law in serving the writ on the defendant.

Defendant's Submission

[14] A central tenet of the defendant's submission revolves around the apparent discrepancies in the plaintiff's submission concerning the writ's validity. In one place, the plaintiff says the writ was valid until 3 February 2023. But in another place, they say it expired on 15 September 2021. It must be noted that this is not an inconsistent submission by the plaintiff, but an alternative submission as stated in the preceding paragraph.

[15] The defendant submits that the plaintiff waited a long time to serve on the defendant the writ after the decision of the court on 4 January 2023, to setting aside the JID and substituted service. It must be noted that at the time when the JID and substituted service were set aside, the writ according to the defendant, had already expired on 15 September 2021. The plaintiff, on the other hand takes two views. One following *Ever Rich Enterprise*'s case (*supra*), which suggests a peculiar "freeze-and-unfreeze" mechanism regarding a writ's validity *ie*, upon entering of default judgment, the time freezes and unfreezes upon the substituted service and judgment in default being set aside. The other view is the same as the defendant.

[16] The plaintiff's foundational argument is based on *Ever Rich Enterprise*'s case (*supra*), which suggests a peculiar "freeze-and-unfreeze" mechanism regarding a writ's validity upon entering of default judgment and subsequently setting aside the default judgment. The defendant has some reservation about the principle postulated in *Ever Rich Enterprise*'s case (*supra*) as it is without any other supporting decided case. Therefore, the defendant submits that this argument of the plaintiff is not well-founded, and it is not consonant with the Rules of Court 2012.

[17] Additionally, the defendant underscores the distinction between the present case and *Ever Rich Enterprise*'s case (*supra*), wherein in that case, the substituted service was valid but in our present case, both the JID and SSO were set aside. In any event, I am not persuaded in determining this case one way or another on this distinction on the facts of the respective cases.

[18] In wrapping up the defendant's submission, they relied on *FIMBank Plc v. The Owners And/Or Demise Charterers Of The Ship Or Vessel "NIKA" Now Known As "Bao Lai"* [2022] 8 CLJ 324. The High Court in this case examined the changes in O. 6 r. 7, of the ROC 2012 particularly since its amendment on 21 September 2000. The court noted that before this date, there was no limit on the number of times a writ could be renewed, provided a reasonable explanation was given for its non-service. However, the amendments introduced several changes: the initial validity of a writ was reduced from 12 to six months, the number of extensions was capped, and it was mandated that any extension request must be made before the writ's expiry. These amendments were aimed at addressing the need to limit the number of extensions a writ could have, with certain allowances based on geography and case type, like admiralty actions.

[19] Based on these amendments, the defendant concludes that this honourable court should not override the provisions of O. 6 r. 7 of the ROC 2012 in using its inherent jurisdiction, considering the deliberate and considered changes made by the Rules Committee.

Court's Finding

Good Faith Of The Plaintiff

[20] The plaintiff promptly initiated the legal action and subsequently attempted to serve the writ on the defendant. The timeline and attempts made show the plaintiff's genuine intentions to serve the defendant and this suggests no deliberate delay.

[21] The plaintiff, after facing failed attempts of service through AR registered and personal means, did not resort to inaction but proactively sought the court's leave to serve by substituted service. The order for substituted service shows the court's initial acceptance of the plaintiff's reasons for substituted service.

[22] The plaintiff secured a judgment in default due to the defendant's non-response, further showing the plaintiff's proactive approach.

[23] When the court set aside the substituted service and the judgment in default, the plaintiff, rather than resorting to inaction, sought to correct the situation by extending the writ's validity. This move underscores the plaintiff's commitment to ensure that due process is complied with. The fault, if any of the plaintiff is that the plaintiff did not apply instantly to the court which set aside the default judgment and the order for substituted service.

Principle And Provisions Of Law In Support The Plaintiff's Position

[24] As per O. 1A of the ROC 2012, the court should prioritise the overriding interest of justice over technical non-compliance. The plaintiff's application embodies this spirit. While there might be technical procedural challenges, the primary pursuit of justice mandates that the plaintiff's proactive efforts not be negated by these minor misgivings.

[25] Flexibility in time extensions: O. 3 r. 5 of the ROC 2012 provides the court with the discretion to extend time periods, even post the expiration of the original period. This provision explicitly recognises the fact that practical scenarios might necessitate such extensions, and the plaintiff's situation is a case in point.

[26] Writ extension principles, by O. 6 r. 7 of the ROC 2012 states the framework for writ extensions. The plaintiff's application respects this framework and meets the conditions stipulated therein. Moreover, the plaintiff's application came within the time frame, a fact underscored by the cited case of *Ever Rich Enterprise v. Ten Mei Theng* [2018] CLJU 1402; [2019] 1 MLRH 194, which accentuates the principle of viewing writ validity in intervals.

[27] Inherent powers of the court, O. 92 r. 4 of the ROC 2012 acknowledges the court's inherent powers to ensure justice is served and prevents the abuse of legal processes. The plaintiff's situation is an opportunity for the court to exercise this power, ensuring that justice is not overshadowed by rigid procedural technicalities.

[28] In *Principles Of Civil Procedure* by Jeffery Pinsler 2013, I quote:

> In leading case of *Kleinwort Benson Lid v. Barbrak Ltd*, Lord Brandon identified three situations which need to be distinguished:
>
> > Category (1) cases are where the application for extension is made at a time when the writ is still valid and before the relevant period of limitation has expired. Category (2) cases are where the application for extension is made at a time when the writ is still valid but the relevant period of limitation has expired. Category (3) cases are where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired.
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> Lord Brandon concluded that different considerations apply in these scenarios: In both category (1) cases and category (2) cases, it is still possible for the plaintiff (subject to any difficulties of service which there may be) to serve the writ before its validity expires, and, if he does so, the defendant will not be able to rely on a defence of limitation. In category (1) cases, but not category (2) cases, it is also possible for the plaintiff before the original writ ceases to be valid, to issue a fresh writ.

A In category (1) and (2) cases, the defendant who has not been served does not have an accrued right of limitation at the time when the application for extension is made. However, in category (3) cases, it is not possible for the plaintiff to serve the writ effectively unless its validity is first retrospectively extended. Accordingly (in the category (3) situation), at the time when the application for extension is made, a defendant on whom B the writ has not been served has an accrued right of limitation. In determining whether the plaintiff has made a sufficient case to justify renewal, the court must attach the appropriate importance to these considerations. The priorities in each case are determined by the circumstances so that, for example, the defendant's potential loss of a limitation defence might be regarded as less compelling if the plaintiff's C inaction was induced by the defendant's consent to the extension of the writ. The court must decide for itself the cumulative effect of all the factors which support or are against renewal.

[29] To further bolster this point, I refer to *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773; [1995] 1 MLJ 525, where the facts are D somewhat similar to the present case. In *Arab-Malaysian Credit Bhd* (*supra*), the plaintiff initially faced difficulties in effecting personal service on the defendant, leading to an order for substituted service granted. The substituted service was carried out and judgment in default was entered against the defendant. The defendant was unaware of these proceedings until later, when E bankruptcy proceedings were initiated based on the default judgment. The defendant then took steps to set aside the default judgment, and this application was filed approximately six years and three months after the default judgment was entered. The judge set aside the default judgment as he deemed flaws in the order for substituted service. The consequence of the F judge's finding was that the writ had expired at the end of 12 calendar months from its issue. To overcome this, the plaintiff made eight separate *ex parte* applications for 12-month extensions, effectively reviving the expired writ. The defendant, upon being served with the extended writ, entered a conditional appearance and subsequently appealed against the orders G extending the writ. Initially, the Senior Assistant Registrar denied the defendant's request. However, on appeal, the judge overturned the extensions, ruling that the court lacked the authority to grant such extensions. The plaintiff then appealed this decision to the Court of Appeal. His Lordship Justice Gopal Sri Ram, was of the view that a court possesses the clear authority to extend the validity of a writ even after it has expired. H Although, the decision to exercise this jurisdiction in a specific instance is left to the discretion of the court that is considering a request for such an extension. This implies that while the legal capability exists, its application depends on the unique circumstances and considerations of each individual case. This is what Justice Gopal Sri Ram JCA said:

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... the observations of Lord Brandon do nothing more than to highlight the salient aspects of the Rule which are plainly visible to one's intellect upon a reading of it and upon a comparison of it with its precursor. What comes through when a reading of the speech as a whole is undertaken is that a court has undoubted jurisdiction to extend a writ even after its expiry. Whether that jurisdiction ought to be invoked in a given case is a matter within the discretion of the court hearing an application to extend: *Waddon v. Whitecroft Scovill Ltd* [1988] 1 All ER 996; [1988] 1 WLR 309.

[30] His Lordship Gopal Sri Ram, in the same case of *Arab-Malaysian Credit Bhd* (*supra*), went further to state on the exercise of the discretion:

Now, it is one thing to say that a court has no power to make an order or to grant relief and quite a different thing to say that a particular order or relief will not, in accordance with settled principles, be granted. A refusal in such circumstances is in fact an exercise of jurisdiction and not a denial of it. This important distinction of principle is well brought out by the following passage in the advice of the Privy Council delivered by Lord Diplock in *Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong* [1970] AC 1136; [1970] 2 WLR 1264 which was applied by our Federal Court in *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29:

> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, *ie*, to embark upon the inquiry whether facts exist which would entitle the court to grant the relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.

Although those words were spoken in the context of declaratory relief, they are of universal application and are analogously relevant to the present case where a rule of court has expressly conferred a wide discretion on the court.

[31] The conclusion reached by His Lordship is also worth considering:

Conclusion

Having addressed our minds to the plain words of O. 6 r. 7, and the decided cases in which it has been considered, we are satisfied that the High Court had ample jurisdiction to grant the plaintiff in the instant case the several extensions sought by it of its writ.

Quite apart from O. 6 r. 7, there is wide power under O. 3 r. 5 conferred upon the High Court to extend time. Even the restriction of granting more than one extension of 12 months expressed in O. 6 r. 7 may, in

A appropriate cases, be overcome by having resort to O. 92 r. 4 (absent in the English RSC) which is a jurisdictional provision. (See *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 MLJ 143.)

Further, in a recent and yet unreported judgment of this court, reference has been made to the important principle that a rule of court should not be construed so as to produce unfairness or a manifest injustice. (See *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd*, Court of Appeal Civil Appeal No P-02-7-94 (since reported in [1995] 1 MLJ 292).) Surely, this principle may be invoked to overcome any technical obstacles in the way of achieving substantial justice in a case where a pedantic approach to a rule of court will result in injustice.

[32] In our present case, the learned Sessions Court, after reviewing the case, did not refuse an extension based on the exercise of his discretion. Instead, he based his refusal on O. 6 r. 7(2A) of the ROC 2012, holding that the plaintiff failed to meet the three necessary requirements for the court to grant a renewal of the writ.

Conclusion

[33] The plaintiff's application represents a sincere pursuit of justice, supported by their continuous proactive actions. The plaintiff cannot be faulted in any way for the 'delay' between the period when the judgment in default was entered and the time it was set aside. By interpreting the Rules of Court 2012 in their true spirit, which is to ensure justice and fairness, the plaintiff's request to extend the writ's validity emerges as not only legitimate but also a necessary step in ensuring that the principles of justice are upheld. I am of opinion that both parties should be given an opportunity to ventilate the merits of each of their respective cases.

[34] For reasons stated above, I allowed the plaintiff's application in encl. 54 with no order as to costs.

Postscript

[35] After delivering my decision of this case on 20 October 2023, the defendant's counsel commendably brought the Federal Court's decision in *Fimbank Plc v. Pemilik Dan/Atau Pencarter Demis Kapal Atau Vesel "NIKA" Kini Dikenali Sebagai "Bao Lai"* [2023] 10 CLJ 165; [2023] 6 MLJ 563 to my attention. The Federal Court delivered this decision on 16 October 2023, just four days before my decision in this case. The Federal Court allowed the appeal, overturning the Court of Appeal's decision in the same case. The defendant had relied on the Court of Appeal's decision in *FIMBank Plc* (*supra*) in the current case before me. It must be noted that neither the court nor the counsel were aware of the Federal Court's decision in *FIMBank Plc* (*supra*) when the decision in the present case was delivered.

[36] Although the Federal Court's decision was in the context of admiralty claims, in my view, the rationale behind O. 6 r. 7(2) of the ROC 2012 applies to all cases where it serves a specific purpose in ensuring due diligence among litigants, particularly focusing on the service of a writ. It is a measure against indolence in litigation, ensuring that parties actively pursue their legal rights and obligations.

[37] The Federal Court is of the view that interpreting O. 6 r. 7(2) of the ROC 2012 as imposing an absolute limit on the number of renewals diverges from the Rule's intended purpose. The court finds that such a rigid interpretation could inadvertently impair the administration of justice rather than facilitate it. It risks penalising diligent litigants who, despite their efforts, are unable to serve the writ due to factors beyond their control.

[38] The Federal Court acknowledges the role of the court's inherent powers in this context. The court's inherent powers are not confined to situations where there is a gap or *lacuna* in the ROC. Even if O. 6 r. 7(2) of the ROC 2012 expressly limits the number of times a writ can be extended, the court should retain the inherent power to go beyond this limit to prevent injustice. This approach ensures that a litigant's statutory right to pursue their claim is not unjustly defeated by a strict and pedantic reading of O. 6 r. 7(2) of the ROC 2012.

[39] I conclude that the Federal Court's decision in *FIMBank Plc* (*supra*) reinforces this court's decision regarding encl. 54 in the present case.